IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 561

BART LUIS CARITATIVO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA and FRED R. DICKSON, Warden, California State Prison at San Quentin, California,

Respondents.

PETITIONER'S OPENING BRIEF

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PETITIONER'S OPENING BRIEF

Opinion of the Court Below

The Supreme Court of the State of California in rendering its Order of May 8, 1957, did not file an opinion. The order of that court appears in the Transcript of Record page 6.

It is brief and provides:

"Petition for writ of habeas corpus and application for stay of execution DENIED.

"This order is final forthwith."

The opinion is reported as follows: *Caritativo* v. *Teets*, 48 A.C. 11 (Minutes, May 8, 1957).

Jurisdiction

The above quoted judgment of the Supreme Court of California was pronounced and entered on May 8, 1957.

In view of the finality with which the judgment was entered, no rehearing was sought.

The Petition for Writ of Certiorari herein was filed on August 1, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. A., Sections 1257(3) and 2101(e).

The basic ground under which the jurisdiction of this Court is invoked is the denial of the constitutional rights of Bart Luis Caritativo, hereinafter called petitioner, under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Constitutional Provisions and Statutes Involved

1. **As to the constitutionality of the California procedure as it concerns the sanity of a person subject to execution:**

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America.

The statutory provisions of the State of California relating to the punishment (execution) of insane persons and to the authority of a warden of the state prison to suspend or not suspend the execution of a defendant under judgment of death are Section 1367 and Sections 3700 through 3706 of the Penal Code of the State of California.

Section 1367 of the California Penal Code provides:

> "Sec. 1367. Insane Immune from Trial or Punishment.—A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

The sections of said Penal Code pertinent to the questions here involved are Sections 3700 and 3701, which provide:

> "Sec. 3700. Death Sentence—Suspension.—No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.
>
> "Sec. 3701. Suspension by Warden for Insanity—Notice to District Attorney—Petition—Jury.—If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry."

2. **As to the constitutionality of the California law and procedure thereunder whereby petitioner was not permitted to enter a plea of not guilty by reason of insanity at the end of the trial of his case in the California Superior Court and prior to judgment:**

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America.

The statutory provisions of the State of California relating to this subject are Sections 1016 and 1026 of the Penal Code of the State of California, which provide as follows:

> "Sec. 1016. Five Pleas Allowable.—There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court:
>
> 1. Guilty.
>
> 2. Not guilty.
>
> 3. A former judgment of conviction or acquittal of the offense charged.
>
> 4. Once in jeopardy.
>
> 5. Not guilty by reason of insanity.
>
> A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."

"Sec. 1926. Procedure on Plea of Not Guilty Because Insane.—When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the State hospital for the criminal insane, or if there be no such State hospital, then that he be confined in some other State hospital for the insane . . ."

Questions Presented

1. **As to the constitutionality of the California procedure as it concerns the sanity of a person subject to execution:**

a. May the life of an insane prisoner under sentence of death be taken by a state as the result of the unreviewable ex parte determination of the crucial fact of sanity made by a single executive officer? Or, stated differently,

b. Are the California courts wholly without power to correct an executive agent's abuse of authority in a matter of such great significance as the execution of insane persons?

In his brief in opposition to the Petition for Writ of Certiorari, page 2, respondent states the question presented as follows: "Is California procedure, which provides no review of the warden's determination of a condemned inmate's sanity, constitutional?" We believe this question more properly stated should read: Does the failure of the California courts to grant a review of the warden's arbitrary and capricious ex parte determination of a condemned inmate's sanity constitute a denial of due process of law?

2. **As to the constitutionality of the California law and procedure thereunder whereby petitioner was not permitted to enter a plea of not guilty by reason of insanity at the end of the trial of his case in the California Superior Court and prior to judgment:**

Did the trial court in this case by construing the meaning and procedure required under the California dual plea statute in such manner as to result in a refusal to allow petitioner to enter a plea of not guilty by reason of insanity

and be tried on said issue after verdict of guilty on the issue of not guilty, but before judgment entered thereon, constitute a denial of due process of law?

Statement of the Case

Petitioner's trial for two murders began before a jury in Marin County, California, on January 6, 1955. At that time his counsel had entered a plea of not guilty on his behalf, and this was the sole issue at the trial. Subsequently, on or about January 10, 1955, after the selection of the jury and opening statements by counsel for the prosecution and for the defense, and the testimony of several prosecution witnesses, petitioner demanded in open court the right to change counsel on the grounds he had lost his faith and trust in his then counsel. After several days of discussion and hearings in Chambers, out of the presence of the jury, the trial court dismissed petitioner's counsel, who had represented him up to that moment, and appointed two new attorneys to represent petitioner during the remainder of the trial. A short continuance was granted, motions for mistrial were denied, and the trial proceeded. On February 28, 1955, the jury found petitioner guilty on both counts of murder and made no recommendation, thereby subjecting him to the punishment of death on each count.

Following the verdict of the jury, but before pronouncement of judgment, petitioner's newly appointed counsel made a formal plea to the court to be allowed at that time, and before sentence was pronounced, to enter a plea of not guilty by reason of insanity in order that a trial on said issue might be had either before the same jury or a new jury sworn for that purpose. Argument was heard and the motion was denied. At the same time a motion was also made for a trial of petitioner on the grounds of

presently existing insanity, and the trial court likewise denied said motion. Thereupon the court pronounced judgment and sentenced petitioner to death. (Reporter's Transcript 3956-3959.)

Thereafter petitioner was confined and is presently confined in the California State Prison at San Quentin, California.

Subsequently and prior to the date set for execution, petitioner's counsel filed a Petition for Writ of Mandamus in the Superior Court of the State of California, in and for the County of Marin, alleging that petitioner was insane and requesting the court to review the action of the warden in failing to invoke the statutory procedures provided under California law in such cases.

The Marin County Superior Court denied the Petition for Mandamus and an appeal was taken to the California Supreme Court. The California Supreme Court affirmed the dismissal of the Petition for Writ of Mandamus, holding that there is no provision for judicial review under California law of the warden's determination of the defendant's sanity. Two justices dissented, implying that the remedy is not by mandamus but rather by habeas corpus. *Caritativo* v. *Teets*, 47 Cal. 2d 304.

Thereafter Certiorari was denied by this Court. *Caritativo* v. *California*, No. 561 Misc., October Term 1956.

Thereafter petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court, which was denied without opinion on May 8, 1957. (Transcript of Record 1-5.)

Thereafter and prior to the filing in this Court of a Petition for Writ of Certiorari to the Supreme Court of the State of California to review the aforesaid denial of Habeas Corpus, a Petition for Habeas Corpus was filed in

the District Court of the United States for the Northern District of California, Southern Division. A copy of said Petition is appended hereto as Exhibit 1.

On May 23, 1957, United States District Judge Oliver J. Carter filed a Memorandum denying petitioner's second ground for relief, to wit, alleged denial of due process of law because petitioner was not permitted to enter a plea of not guilty by reason of insanity at the trial of his case in the Superior Court, but holding that the first ground for relief, going to the question of the constitutional rights of petitioner which come into play upon the allegation of post-conviction insanity, presents a more serious question. After reviewing the decisions on the subject, Justice Carter granted a stay of execution and held that the constitutional issues involved had not necessarily been resolved by the *Solesbee* case (*Solesbee* v. *Balcom*, 339 U. S. 9 at 12), and accordingly issued an order to show cause. A copy of said Memorandum Opinion is appended hereto as Exhibit 2.

On June 21, 1957, Justice Carter filed a Memorandum and Order dismissing the Petition for Habeas Corpus for the reason that petitioner had failed to exhaust his state remedies. A copy of said Memorandum and Order is appended hereto as Exhibit 3.

Thereupon petitioner filed a Petition for Writ of Certiorari in this Honorable Court, and Certiorari was granted October 21, 1957.

Argument

1. As to the constitutionality of the California procedure as it concerns the sanity of a person subject to execution:

After petitioner's conviction on two counts of murder he was sentenced to death. The judgments of guilt and sentences of death were affirmed on appeal. *People* v. *Caritativo*, 46 Cal. 2d 68. This Court denied Certiorari. *Caritativo* v. *Teets*, 793 Misc., October term 1955.

Petitioner has been confined at San Quentin Prison, California, since the sentences of death were pronounced, and is presently there awaiting execution except for the outcome of this proceeding.

During his confinement at San Quentin Prison petitioner was visited, talked to and observed by his counsel, who concluded that petitioner was obviously and patently mentally ill and presently insane. His attorney called the attention of the warden to petitioner's mental condition orally and by letter, and was informed by the warden that no proceedings would be taken as provided by California law in such circumstances. California Penal Code, Sections 1367, 3700 and 3701. Petitioner's counsel then asked the warden for an opportunity to read and review the prison psychiatric reports on petitioner, and this request was denied. Petitioner's counsel also asked the warden for permission to have a privately hired psychiatrist read and review the prison psychiatric records on petitioner and make a psychiatric examination of petitioner in order that his counsel might be fully advised as to the petitioner's mental condition. This was also refused.

Petitioner's counsel then filed a Petition for a Writ of Mandamus in the California Supreme Court alleging the

foregoing facts and declaring that in his opinion petitioner was and is presently insane, and asked for an order of court requiring the warden to perform his duties as set forth by law. This petition was based on the authority of *Phyle* v. *Duffy*, 334 U. S. 431 at 444-445, in which this Court in a proceeding somewhat similar to the present one denied certiorari in a habeas corpus proceeding because the Attorney General of California stated to this Court during the hearings that habeas corpus was not the proper remedy in California, but mandamus was and is the proper remedy. Accordingly this Court held as follows:

> "The court now finds that all that the California Supreme Court did was to hold that as a matter of California procedure, the petitioner's claim could not be passed on by the direct remedy of habeas corpus, but that there is available a special local remedy, labeled mandamus, whereby the petitioner can judicially test his present sanity . . . Whatever may be the elegancies of procedure by which the matter is to be determined, our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that state is what our decision presupposes it to be, namely, that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity. This means, of course, not the very restricted scope of relief which is normally associated with the traditional remedy of mandamus. It presupposes that California affords petitioner the means of challenging in a substantial way the ex parte finding of the Superintendent of the State Hospital . . . and enables him to secure judicial determination of the claims he has made in

his petition for habeas corpus, which, so the court now holds, is not the proper way to proceed.

". . . In this situation, we find no federal constitutional question presented, which is ripe for decision here." *Phyle* v. *Duffy*, *supra*.

It was on the basis of the above decision that petitioner sought relief by mandamus in the California Supreme Court, but that court denied the petition and held that mandamus was not available as a remedy. Two justices dissented however, and implied in their dissents that the remedy should be by habeas corpus. *Caritativo* v. *Teets*, 47 Cal. 2d 304. Certiorari was denied by this Court, *Caritativo* v. *California*, No. 561 Misc., October Term 1956.

Petitioner then sought relief by filing a Petition for Habeas Corpus in the Supreme Court of California, which petition was denied without opinion. *Caritativo* v. *Teets*, 48 A.C. 11 (Minutes May 8, 1957).

It is contended here that the failure of the California Supreme Court to grant petitioner a Writ of Habeas Corpus to compel the warden to take action under Section 3701 of the California Penal Code constitutes a denial of petitioner's right to due process of law under the Fourteenth Amendment of the Constitution of the United States. Petitioner contends that this view is supported not only by the decision of this Court in the case of *Phyle* v. *Duffy*, *supra*, but also by Memorandum and Order (Petitioner's Exhibit 2) of the United States District Court for the Northern District of California in *Caritativo* v. *Teets*, —— Fed. Supp. ——, in which District Judge Oliver J. Carter, on May 23, 1957, said:

"The first ground presents a more serious question, and goes to the question of the constitutional rights of petitioner which come into play upon the allegation of

post-conviction insanity. This question as it affects the California statutes was given careful attention by the Supreme Court of the United States in the case of *Phyle* v. *Duffy*, 344 U.S. 431, and by this Court in the case of *Application of Phyle*, 95 F. Supp. 555. Were it not for the recent decision of the Supreme Court of the State of California in *Caritativo* v. *Teets*, reported in 47 A.C. 308, the Phyle cases would have appeared to have disposed of this case. In the recent Caritativo decision the Supreme Court of California has overruled its prior decision in *Phyle* v. *Duffy*, 34 Cal. 2d 144, and now holds that mandamus is not a proper vehicle for asserting the right here involved. This reversal of position by the California Supreme Court requires this Court to again consider all of the constitutional questions which were before the United States Supreme Court in *Phyle* v. *Duffy*, 334 U.S. 431, and which were not reached because of the availability of the remedy of mandamus to a person in Phyle's position, and to a person now in the position of Caritativo.

"The State contends that the decision of the United States Supreme Court in *Solesbee* v. *Balcom*, 339 U.S. 9, which was decided subsequent to *Phyle* v. *Duffy* disposes of the issue adversely to petitioner. Without finally deciding the issue it is apparent that there are differences between the Georgia statute involved in the *Solesbee* case and the California statute involved in the *Phyle* case, and that there are factual differences which may distinguish the two cases, and that the same differences may exist between the *Solesbee* case and the *Caritativo* case. Therefore, at the present time this Court cannot say that the *Solesbee* case has resolved the constitutional issues adversely to the petitioner."

The State of California now proclaims in effect that it is wholly without power to correct an executive agent's abuse of authority in the matter of such significance as the execution of an insane person, no matter how arbitrary or capricious such abuse of authority may be. *Caritativo* v. *Teets*, 48 A.C. 11; *Rupp* v. *Teets*, 49 A.C., Minutes of August 27, 1957. We find it difficult to believe this to be the law, and we do not conclude that *Soleshee* v. *Balcom*, *supra*, so holds. If this be the law in California, then the California procedure under such circumstances is clearly unconstitutional and in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

To countenance such procedure is to violate one of the most fundamental and basic laws of society and humanity inherent in the civilized race from time immemorial. It is contrary to social and natural law to kill a man who has become insane.

On the facts herein alleged and also stated in the Petition for Writ of Habeas Corpus filed in the court below, which facts for our present purposes must be accepted as true, this is a clear situation wherein the State of California is about to take the life of a condemned man as to whom there is good reason to believe that he is now insane.

Justice and the constitutional requirements of due process demand that under such circumstances the warden be required to show cause why the condemned man shall not be executed.

2. **As to the constitutionality of the California law and procedure thereunder whereby petitioner was not permitted to enter a plea of not guilty by reason of insanity at the end of the trial of his case in the California Superior Court and prior to judgment:**

It is the contention of petitioner that under the circumstances of this case it was a violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States to deny him any opportunity to be tried upon the plea of not guilty by reason of insanity. It is true that his first counsel had failed to enter said plea on his behalf and had they continued as his counsel throughout the trial it might be said that he was bound by such failure. However, when the court granted his motion for a change of counsel and gave him two new attorneys, it was a deprivation of fundamental rights for said court to refuse to allow said petitioner to be effectively represented by the newly appointed counsel who sought to obtain a trial for said petitioner on the plea of not guilty by reason of insanity.

The posture of the trial after the appointment of new counsel, insofar as the time for the entrance of a plea of not guilty by reason of insanity, was unique and unprecedented. The jury had been selected and the trial began. Therefore an effective plea of not guilty by reason of insanity could not have been entered in the course of the then proceeding trial because there could be no opportunity to examine said jurors on voir dire examination. The only way petitioner's rights could be protected would be for the court to have granted a mistrial and to have begun again with the selection of a new jury. This the court refused to do. It was the position of the court that petitioner's rights would be protected by the entry of a plea of not guilty by reason of insanity at any time prior to the rendition of a verdict on the not guilty plea. Peti-

tioner's counsel could not follow such procedure because under the circumstances of the case to have entered such a plea after the commencement of the trial and without voir dire examination of the jurors and after the dismissal of previous counsel, would have been tantamount to a plea of guilty on the main trial with nothing left for the jury but a trial on the issue of insanity.

The above was brought to the attention of the court, in Chambers, but the court nevertheless took the position that the plea of not guilty by reason of insanity would have to be entered during the course of the trial and before the verdict of the jury or not at all. Counsel for petitioner took the position that irreparable harm and prejudice would result to the petitioner by entering the plea before the rendition of a verdict, but on the contrary that the entry of the plea of not guilty by reason of insanity after the verdict and before judgment would be the only way it could be done without completely violating the petitioner's rights.

As a result of the foregoing petitioner was denied the right to a trial on a plea of not guilty by reason of insanity, and to this date has never had such a trial on such plea.

CONCLUSION

It is respectfully submitted that the holding of the California Supreme Court in this cause be reversed as to each of the questions presented, separately and jointly, and that this cause be remanded to said court with a direction that an order issue directed to the respondents to show cause why the writ prayed for should not issue.

Dated: San Francisco, California
February 28, 1958

GEORGE T. DAVIS
Attorney for Petitioner

EXHIBIT 1

GEORGE T. DAVIS
98 Post Street
San Francisco 4, California
EXbrook 2-6788

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 36461

In the Matter of the Application of

BART LUIS CARITATIVO

For a Writ of Habeas Corpus.

HARLEY O. TEETS, Warden, California State Prison,
San Quentin, California, Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

The Petition of GEORGE T. DAVIS respectfully shows:

I

That he is the Attorney for the above-named BART LUIS CARITATIVO; and files this petition on behalf of said BART LUIS CARITATIVO.

II

That said CARITATIVO is imprisoned, detained and restrained of his liberty by HARLEY O. TEETS, Warden of the California State Prison at San Quentin, County of Marin, California, under commitments issued out of the Superior Court of the County of Marin, resulting from judgments imposing on two counts sentences of death.

III.

Petitioner alleges that said detention is and will continue to be unlawful, illegal and in violation of petitioner's rights to due process and equal protection of the law as guaranteed under the 14th Amendment of the Constitution of the United States unless the relief prayed for herein is granted.

IV

Data pertinent to the within petition is as follows:

1. CARITATIVO's conviction of two murders was affirmed by the California Supreme Court on automatic appeal on February 1, 1956.

People v. *Caritativo*, 46 A.C. 67

2. Petition for rehearing denied February 29, 1956.

3. Petition for Certiorari in the Supreme Court of the United States denied June 4, 1956.

4. Death penalty imposed June 18, 1956, and date of execution set for August 31, 1956.

5. Petition for Writ of Mandate in the Superior Court of Marin County seeking to compel the Warden to institute proceedings to determine present sanity of CARITATIVO filed August 30, 1956, and denied on same date.

6. Appeal from denial of petition for Writ of Mandate filed in the Supreme Court of California on August 31, 1956, and stay of execution pending appeal granted.

7. Appeal dismissed by the California Supreme Court on November 20, 1956, and remittitur issued forthwith.

Caritativo v. *Teets*, 47 A. C. 308

8. A new and presently existing date for execution was then set and CARITATIVO's *death date now is May 24, 1957.*

9. On January 29, 1957, a petition for Certiorari was filed in the Supreme Court of the United States challenging the constitutionality of the above-mentioned decision of the Supreme Court of California in the Mandamus proceedings. On the same date a stay of execution was ordered by Justice

William O. Douglas. On February 25, 1957, the petition for Writ of Certiorari was denied.

Caritativo v. *California*, No. 561 Misc. October Term 1956

10. On May 7, 1957, a petition for Writ of Habeas Corpus and Application for Stay of Execution was filed in the Supreme Court of the State of California and on May 8, 1957, that Court denied both, making its order final forthwith. The grounds for the petition in the California Supreme Court are identical with the grounds set forth herein as the basis for the writ applied for herein. Said grounds specifically set forth an alleged denial of due process of law and equal protection of the laws as guaranteed by the 14th Amendment of the Constitution of the United States.

V

The illegality complained of herein arises from the following facts:

1. It is the opinion and belief of your petitioner that CARITATIVO is presently insane and therefore not subject to execution under California Law.

2. CARITATIVO's custodian, the Warden of San Quentin Prison, has reason to believe that said CARITATIVO is presently insane and therefore not subject to execution under California Law.

3. The Warden of San Quentin Prison, although requested to do so, has arbitrarily refused to institute proceedings to determine the present sanity of CARITATIVO in accordance with the provisions of Sections 3700 and 3701 of the California Penal Code.

4. Unless ordered to do so, the Warden will persist in his refusal to institute proceedings to determine the present sanity of CARITATIVO, and as a result said CARITATIVO, who is presently insane, will be put to death on May 24, 1957, in violation of his rights under California Law and as guaranteed by the Constitution of the United States.

AS AN ADDITIONAL AND SEPARATE GROUND for the issuance of a Writ of Habeas Corpus, petitioner alleges the following:

I

CARITATIVO's trial for two murders began before a Jury in Marin County on January 6, 1955. At that time his counsel had entered a plea of not guilty on his behalf, and this was the sole issue at the trial. Subsequently, on or about January 10, 1955, after the selection of the Jury and opening statements by counsel for the prosecution and for the defense, and the testimony of several prosecution witnesses, CARITATIVO demanded in open court the right to change counsel on the grounds he had lost his faith and trust in his then counsel. After several days of discussion and hearings in Chambers, out of the presence of the Jury, the Trial Court dismissed CARITATIVO's counsel, who had represented him up to that moment, and appointed two new attorneys to represent CARITATIVO during the remainder of the trial. A short continuance was granted, motions for mistrial were denied, and the trial proceeded. On February 28, 1955, the Jury found CARITATIVO guilty on both counts of murder and made no recommendation, thereby subjecting him to the punishment of death on each count.

II

Following the verdict of the Jury, but before pronouncement of judgment, CARITATIVO's newly appointed counsel made a formal plea to the court to be allowed at that time, and before sentence was pronounced, to enter a plea of not guilty by reason of insanity in order that a trial on said issue might be had either before the same Jury, or a new Jury sworn for that purpose. Argument was heard and the motion was denied. At the same time a motion was also made for a trial of the defendant on the grounds of presently existing insanity, and the Trial Court likewise denied said motion. Thereupon the court pronounced judgment and sentenced CARITATIVO to death.

III

It is the contention of petitioner that under the circumstances of this case it was a violation of CARITATIVO's rights under the 14th Amendment to the Constitution of the United States to deny him any opportunity to be tried upon the

plea of not guilty by reason of insanity. It is true that his first counsel had failed to enter said plea on his behalf and had they continued as his counsel throughout the trial it might be said that he was bound by such failure. However, when the Court granted his motion for a change of counsel and gave him two new attorneys, it was the deprivation of fundamental rights for said Court to refuse to allow said CARITATIVO to be effectively represented by the newly-appointed counsel who sought to obtain a trial for said CARITATIVO on the plea of not guilty by reason of insanity.

IV

The posture of the trial after the appointment of new counsel, insofar as the time for the entrance of a plea of not guilty by reason of insanity, was unique and unprecedented. The Jury had been selected and the trial began. Therefore an effective plea of not guilty by reason of insanity could not have been entered in the course of the then proceeding trial because there could be no opportunity to examine said jurors on voir dire examination. The only way defendant's rights could be protected would be for the Court to have granted a mistrial and to have begun again with the selection of a new Jury. This the Court refused to do. It was the position of the Court that defendant's rights would be protected by the entry of a plea of not guilty by reason of insanity at any time prior to the rendition of a verdict on the not guilty plea. CARITATIVO's counsel could not follow such procedure, because under the circumstances of the case to have entered such a plea after the commencement of the trial and without voir dire examination of the jurors and after the dismissal of previous counsel, would have been tantamount to a plea of guilty on the main trial with nothing left for the Jury but a trial on the issue of insanity.

V

The above was brought to the attention of the Trial Court, in Chambers, but the Court nevertheless took the position that the plea of not guilty by reason of insanity would have to be entered during the course of the trial

and before the verdict of the Jury or not at all. Counsel for CARITATIVO took the position that irreparable harm and prejudice would result to the defendant by entering the plea before the rendition of a verdict, but, on the contrary, that the entry of the plea of not guilty by reason of insanity after the verdict and before judgment would be the only way it could be done without completely violating the defendant's rights.

VI

As a result of the foregoing, CARITATIVO alleges he was denied the right to a trial on a plea of not guilty by reason of insanity, and to this date has never had such a trial on such plea, which denial he alleges deprives him of his fundamental rights as guaranteed under the 14th Amendment to the Constitution of the United States.

WHEREFORE, petitioner prays as follows:

1. That a Writ of Habeas Corpus may issue directed to HARLEY O. TEETS, commanding him that he have the body of said CARITATIVO, by him imprisoned, detained and restrained, before this Honorable Court at a time and place to be therein specified, and for such other relief as the Court may deem meet and proper in the premises.

2. That this Court issue a stay of execution pending the determination of the above and that CARITATIVO's execution now scheduled for May 24, 1957, be stayed until further order of this Court.

Dated: May 21, 1957.

GEORGE T. DAVIS
George T. Davis
Attorney for Bart Luis Caritativo

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.*:

GEORGE T. DAVIS, being first duly sworn, says:

That he is the attorney for BART LUIS CARITATIVO; that he knows the contents of the above petition to be true except as to those matters stated upon information or belief and that as to those matters he believes it to be true.

GEORGE T. DAVIS

Subscribed and sworn to before me
this 21st day of May, 1957.

(SEAL) RAY WOLINS
Notary Public in and for the City
and County of San Francisco, State
of California

My Commission Expires June 13, 1958.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 36461

In the Matter of the Application of

BART LUIS CARITATIVO

For a Writ of Habeas Corpus.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California.

MEMORANDUM

George T. Davis, as attorney for the above-named petitioner has filed a petition for a writ of habeas corpus and an application for a stay of execution.

The petition alleges two grounds for relief. The first ground is that the petitioner is presently insane, and is being held by the Warden at San Quentin Prison awaiting execution under a commitment and sentence from the Superior Court of the State of California in and for the County of Marin. The date of execution has presently been set for May 24, 1957. Upon this ground the petitioner alleges that the Warden has reason to believe that petitioner is presently insane, and, therefore, not subject to execution under California law, and that the Warden, although requested to do so, has arbitrarily refused to institute proceedings to determine the present sanity of petitioner in accordance with the provisions of Sections 3700 and 3701 of the California Penal Code.[1]

[1] §3700. Persons authorized to suspend execution

No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the

As a second ground for relief petitioner alleges he was denied due process because he was not permitted to enter a plea of not guilty by reason of insanity at the trial of his case in the Superior Court. For the purpose of this proceeding the Court does not consider the second ground to state any claim for relief, and would not warrant this Court staying the death sentence heretofore imposed. Without referring to all of the proceedings in petitioner's criminal case before the State courts, it is sufficient to state that he was aware of and could have presented this question on appeal from his judgment of conviction, and that he failed to do so. This Court will not permit the writ of habeas corpus to be substituted for the process of appeal, and therefore no relief will be granted upon this ground.

The first ground presents a more serious question, and goes to the question of the constitutional rights of petitioner which come into play upon the allegation of post-conviction insanity. This question as it affects the California statutes was given careful attention by the Supreme Court of the United States in the case of *Phyle* v. *Duffy*, 344 U.S. 431, and by this Court in the case of *Application of Phyle*, 95 F.Supp. 555. Were it not for the recent decision of the Supreme Court of the State of California in *Caritativo* v. *Teets*, reported in 47 A.C. 308, the Phyle cases would have appeared to have disposed of this case. In the recent Caritativo decision the Supreme Court of California has overruled its prior decision in *Phyle* v. *Duffy*, 34 Cal. 2d 144, and now holds that mandamus is not a proper vehicle

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State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken.

§3701. Insanity; notice to district attorney; petition for inquiry; jury

If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry.

for asserting the right here involved. This reversal of position by the California Supreme Court requires this Court to again consider all of the constitutional questions which were before the United States Supreme Court in *Phyle* v. *Duffy*, 334 U.S. 431, and which were not reached because of the availability of the remedy of mandamus to a person in Phyle's position, and to a person now in the position of Caritativo.

The State contends that the decision of the United States Supreme Court in *Solesbee* v. *Balcom*, 339 U.S. 9, which was decided subsequent to *Phyle* v. *Duffy* disposes of the issue adversely to petitioner. Without finally deciding the issue it is apparent that there are differences between the Georgia statute involved in the *Solesbee* case and the California statute involved in the *Phyle* case, and that there are factual differences which may distinguish the two cases, and that the same differences may exist between the *Solesbee* case and the *Caritativo* case. Therefore, at the present time this Court cannot say that the *Solesbee* case has resolved the constitutional issues adversely to the petitioner.

Another question is presented from the petition. The petition alleges that on May 7, 1957, an identical petition for a writ of habeas corpus and application for stay of execution was presented to the Supreme Court of the State of California, and on May 8, 1957, that Court denied both without opinion, but making its order final forthwith. There is no allegation, and petitioner's counsel concedes that no petition for certiorari has yet been presented to the Supreme Court of the United States. This brings into play the question of exhaustion of state remedies, and the powers of this Court under Title 28 U.S.C. §2254. See: *Darr* v. *Burford*, 339 U.S. 200.

In a very recent opinion the Court of Appeals for the Ninth Circuit has discussed this question in *Dickson* v. *Castle*, —— F.2d ——, #15375, decided May 8, 1957. The question then is whether there are exceptional circumstances here present which will permit this Court to consider the petition for writ of habeas corpus, even though the state remedies have not been exhausted by petition for certiorari to the Supreme Court of the United States.

The special or exceptional circumstance given here is the impending execution of the death penalty before sufficient time had elapsed between the order of the Supreme Court of the State of California denying petitioner's petition for writ of habeas corpus and application for stay of execution and the execution date. This subject was discussed in *Thomas* v. *Duffy*, 191 F.2d 360, where the immediate pendency of execution was considered to be a special circumstance requiring the interposition of the powers of a Federal Court under Section 2254. While the factual situation here is much more questionable than that set forth in *Thomas* v. *Duffy* because of the greater lapse of time between the final order of the California Supreme Court and the date of execution there is still a question to be determined by this Court which should not be determined under the pressure of the time limitations created by the time set for execution.

Upon the filing of the petition in this case on the morning of May 22, 1957, an order to show cause was issued out of this Court setting the matter for hearing at three o'clock p.m. on May 22, 1957. At that hearing counsel for the State appeared and orally made a motion to dismiss, and counsel entered into a stipulation that petitioner was being held by the Warden of the California State Prison at San Quentin pursuant to a judgment and commitment of execution issued out of the Superior Court of the State of California in and for the County of Marin. No opportunity has been given for the preparation or presentation of a formal return by the State, or for a full and complete hearing on the issues presented by the petition and any return made thereto. It is the opinion of this Court that the stay of execution should be granted, and an order to show cause should be issued setting the matter down for hearing at a time when the record can be fully developed and more fully argued and presented by counsel.

An order in conformity herewith will be entered as of this date.

Dated: May 23, 1957.

OLIVER J. CARTER
United States District Judge

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 36461 Civil

BART LUIS CARITATIVO, Petitioner,

v.

HARLEY O. TEETS, Warden, California State Prison at San Quentin, Respondent.

MEMORANDUM AND ORDER

On May 22, 1957, a petition for habeas corpus and an application for a stay of execution was filed in this Court on behalf of Caritativo. An order to show cause issued, and return was made by the State of California on the afternoon of May 22, 1957. Petitioner sought in essence a judicial inquiry into the question of his sanity, and this Court was unable to summarily dispose of his right to such an inquiry in the light of the pertinent Supreme Court decisions. Thereupon this Court stayed the execution and set the matter down for further hearing. Further argument was then had on the legal issues raised by the petition and have been submitted to the Court for decision.

The initial question for decision here is whether this Court should dismiss the petition in view of the petitioner's failure to seek a review by the United States Supreme Court of the denial of his petition for habeas corpus by the California Supreme Court. Title 28 of the United States Code, §2254 provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence

of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

At the initial hearing in this matter counsel sought to circumvent the requirement of certiorari by his sworn statement to the effect that in the fourteen day interim between the denial of the petition by the State Court and the date set for execution, he was required to prepare briefs and submit argument to the United States Supreme Court in another case, and was thus unable to prepare Caritativo's petition before the time set for execution. The Court accepted that as a prima facie showing of an "exceptional circumstance", *Ex parte Hauk*, 321 U.S. 114 (1944), *Darr* v. *Burford*, 339 U.S. 200 (1950), and *Thomas* v. *Duffy*, 191 F.2d 360, upon which the execution should be stayed. However, the execution having been stayed, there no longer exists circumstances which render the process of exhaustion of state remedies ineffective to protect the rights of petitioner. The stay of execution issued by this Court had the effect of postponing the date set for execution by at least sixty days. California Penal Code §1227. The time needed to petitioner to perfect and file his petition for certiorari thereupon became available, and should be utilized accordingly.

Petitioner also argued at the subsequent hearings that where the State Court has decided that the remedy of habeas corpus is not available under State practice, it is unnecessary for him to ask the United States Supreme Court for certiorari in order to exhaust his State remedies. It is true that an absence of any kind of corrective remedy will obviate the need of first seeking certiorari; this is made clear by the language of Section 2254. But the Court is not prepared to rule at this time that no such remedy exists under the law of California to a person in the position of Caritativo. The holding of the California Supreme Court in *Caritativo* v. *Teets*, 47 A.C. 311, is an express overruling of its prior holding that mandamus was available, but it is not clear that the remedy of habeas corpus is also unavailable. Petitioner's subsequent application for habeas corpus to the California Supreme Court on

May 7, 1957, was denied without opinion; the basis of the denial not being clear, this Court is not in a position to proceed to the merits. In this posture of the case, there is every reason for him to first seek certiorari in the United States Supreme Court. See: *Dixon* v. *Duffy*, 342 U.S. 33 (1951), and *Dixon* v. *Duffy*, 344 U.S. 193. The ruling of that Court may well determine the unresolved questions, and end the necessity of seeking relief here.

It Is, Therefore, Ordered that the petition for habeas corpus be, and the same is hereby dismissed, the order to show cause heretofore issued is hereby discharged, and the stay of execution heretofore issued is hereby vacated and set aside.

Dated: June 21, 1957.

Oliver J. Carter
United States District Judge